TAMAN PANGKOR SDN. BHD.

v.

DORIC DEVELOPMENT SDN. BHD. & ORS.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 613 OF 1983]
24 DECEMBER 1986

CIVIL PROCEDURE: *Application to set aside judgment in default of appearance - Inordinate delay in filing application - Reasons for delay - Explanation not very reasonable - Whether material.*

This was an application by the 3rd defendant, Cik Zainon binte Zainal Abidin, to set aside a judgment in default of appearance entered against her by the plaintiff. The writ of summons endorsed with the statement of claim was served on the 3rd defendant on 29 September 1983. The service was not really disputed. Judgment in default of appearance was entered on 5 March 1984. It was only on 21 April 1986 that the 3rd defendant filed a summons to set aside the default judgment.

Held:

[1] Prayers (1), (2) and (3) of the statement of claim fitted in squarely with O. 13 r. 6(1) of the Rules of the High Court 1980 so that the plaintiff would be precluded from entering judgment for default of appearance forthwith, and would be, notwithstanding the non-appearance, required to proceed with the action as if the defendant had entered an appearance.

[2] In these circumstances, the plaintiff under the present Rules of the High Court, ought to have proceeded further either by summons under O. 81 of the Rules of the High Court (on the ground that the 3rd defendant had no defence), for rescission of the agreement in question as prayed and allied reliefs, or a summons or motion for judgment under O. 19 r. 7.

[3] The failure of the plaintiff to so proceed is decisive in favour of the 3rd defendant; so the application is allowed.

[4] When judgment obtained by default, is irregular as in the instant case where as a rule it should be set aside *ex debito justitiae*, then delay, however long or inordinate, and not even excused by any reasonable explanation, is immaterial, except for the question of costs.

[Application allowed. Costs ordered in the cause herein.]

Cases referred to:

Syarikat Joo Seng & Anor. v. Habib Bank Ltd. [1986] 2 MLJ 129
Evans v. Bartlam [1937] AC 437
White v. Weston [1968] 2 All ER

Legislation referred to:

Rules of the High Court 1980, O. 2 r. 1, 2(1), O. 13 rr. 1, 2, 3, 4, 5, 6(1), O. 19 rr. 5, 7(1), O. 81

For the plaintiff - Ngeh Koo Ham; M/s. Nga Hock Cheh & Co.
For the defendants - T. Dhana; M/s. Zain & Co.

JUDGMENT

Peh Swee Chin J:

I have earlier allowed an application by the 3rd defendant to set aside a judgment in default of appearance entered against her by the plaintiff. I now give my reasons.

The statement of claim referred to two agreements entered into between the parties and claimed per its prayers as follows:

(1) A declaration that the second agreement has been duly rescinded or alternatively rescission of the said agreement.

(2) An injunction restraining the 1st defendant by its directors, servants or agents or otherwise howsoever from any further dealings with the said land.

(3) An order that the 1st defendant re-transfer the said land to the plaintiff free from all encumbrances.

(4) Damages for breach of contract.

(5) Interest on the amount of such damages at such rate and for such period as the Court think just.

(6) Costs.

(7) Further or other relief.

The writ of summons endorsed with the statement of claim was served on the 3rd defendant on 29 September 1983. The service was not really disputed. Judgment in default of appearance was entered on 5 March 1984. It was only on 21 April 1986 that the 3rd defendant had awaken and then filed a summons to set aside the default judgment.

Various explanations and grounds were given to support the application, they were wholly, in my view, devoid of any efficacy save one, which, unfortunately for the plaintiff, was decisive in favour of the 3rd defendant, backed as it was by a very recent decision of the Supreme Court.

The ground which was decisive, was as contained in para. 4 of the affidavit of the 3rd defendant made on 12 April 1986, (encl. 28), as follows:

> 4. I am further advised and verily believe that under O. 13 r. 6(1) of the Rules of the High Court 1980, the plaintiff, in the event that no Memorandum of Appearance is filed, should proceed with the action as if the defendants have entered appearance.

It is clear from O. 13 rr. 1 to 6, of the Rules of the High Court that the prayers (1), (2) and (3) of the statement of claim as set out above, were not of the description mentioned in O. 13 rr. 1 to 5, but fitted in squarely with O. 13 r. 6(1) so that the plaintiff would be precluded from entering judgment for default of appearance forthwith, and would be, notwith-standing the non-appearance, required to proceed with the action as if the defendant had entered an appearance.

In these circumstances, the plaintiff under the present Rules of the High Court, ought to have proceeded further either by summons under O. 81 of the Rules of the High Court (on the ground that the 3rd defendant had no defence), for rescission of the agreement in question as prayed and allied reliefs, or a summons or motion for judgment under O. 19 r. 7, after the expiry of the time for service of defence for default of defence, for such judgment as the plaintiff appeared entitled to on its statement of claim.

The preclusion from entering judgment for default of appearance unless leave was so obtained, was decided by Seah SCJ in *Syarikat Joo Sent & Anor. v. Habib Bank Ltd.* [1986] 2 MLJ 129, a decision under the present Rules of the High Court. In that case, the claim was for 2 declarations, followed by a claim for damages for deceit etc. and interest. A conditional appearance was entered, and the plaintiff signed judgment for default of defence. The High Court refused an application to set aside such default judgment, and Seah SCJ delivering the judgment of the Supreme Court, allowed the appeal, holding that since the claim there seemed to be grounded on the basis that could not be brought under any of the rules, *viz.* O. 19 r. 2 to O. 19 r. 5, (corresponding to O. 13 r. 1 to r. 5 in relation to default of appearance as occurred in the instant case), leave for judgment should be sought under O. 19 r. 7(1) (corresponding to O. 13 r. 6(1) in relation to the said default of appearance), and that the judgment entered earlier for such default was irregular and should be and was set aside *ex debito justitiae.*

The reasoning of his Lordship in the case cited above should undoubtedly and equally apply in the case of appearance for which judgment was signed without another summons or motion for judgment as stated earlier and contrary to O. 13 r. 6(1).

It was however argued in the instant case that by virtue of O. 2 r. 2(1), any application for setting aside any proceedings for irregularity should not be allowed unless it was made within a reasonable time, and that there was excessive and inordinate delay in the 3rd defendant's filing her application. On the facts as disclosed by the affidavit of the 3rd defendant, there was in fact undue delay in filing this application to set aside in this case. Service was effected on 23 August 1984 and application to set aside was only filed on 21 August 1986. The reasons given by her for the delay, even accepting them on their face value in toto, failed to measure up to a reasonable explanation.

How should this Court deal with the statutory rule i.e. O. 2 r. 2(1) providing for this application to be filed within a reasonable time in the face of the 2 years' delay? The answer was that the O. 2 r. 2(1) would not apply to an irregular judgment obtained in default of appearance contrary to O. 13 r. 6(1); this must be so because his Lordship in the case of *Syarikat Joo Seng (supra)* has held to that effect by stating, that the word "proceedings" in O. 2 r. 1 did not include an irregular judgment in default of defence obtained contrary to O. 19 r. 7(1). By the same token, the word "proceedings" in O. 2 r. 2(1) would also not include an irregular judgment in default of appearance obtained contrary to O. 13 r. 6(1).

Being rid of O. 2 r. 2(1) did not, however, prove to be an immediate panacea for the 3rd defendant, for the position of the case law would have to be referred to to ascertain if she could extricate herself from about two years' inaction before she filed this application for setting aside the default judgment in question.

The starting point for the case-law would be the oft-quoted case of *Evans v. Bartlam* [1937] AC 437, in which Lord Atkin said at p. 480:

> The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion ...

> The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

Lord Atkin did not deal directly but only indirectly, with the question of delay for filing an application to set aside a judgment by default; not directly because his Lordship had addressed himself to the non-existent rule (according to his Lordship) of the necessity to give any explanation for allowing judgment to go by default, and indirectly, in my view, for delay to comply in time with any particular rule for preventing judgment from being entered in default. Further, Lord Atkin's statement of non-existent rule was qualified by his Lordship himself later when he stated that such explanation would be considered also when the Court exercised its discretion on an application to set aside.

If any necessity for any explanation for failure, (and for delay, for that matter) to comply with any rule so as to prevent the opposite party from taking judgment by default, was treated by Lord Atkin as so trivial, if not totally non-existent, then the delay to which such necessity for explanation relates, could not be anything but trivial, so that when it is considered by the Court on such an application to set aside, it should never, be ever, considered as any decisive factor in any sense at all.

In view of what I have just stated with regard to Lord Atkin's dictum, *a fortiori*, in a case when judgment obtained by default, is irregular as in the instant case where as a rule it should be set aside *ex debito justitiae*, then in my view, delay, however long or inordinate, and not even excused by any reasonable explanation, is immaterial, except for the question of costs which I will deal with later. There is another distinct reason for my view on principle. If a plaintiff is not entitled at all in certain circumstances to sign judgment, when such judgment, if signed, would be a fundamental defect, why should the delay for removing such fundamental defect be penalised? Another analogy may clarify the position even further. If judgment in default is obtained in defect of appearance on the basis of service of the writ which has incontrovertibly in fact, never been served should an applicant for setting aside the judgment be held liable to account for any delay in filing his application? For these reasons, I was of the view that the application herein should be allowed.

In setting aside the irregular judgment, I should normally not have imposed on the 3rd defendant any term or even a contingent term as to costs, please see *White v. Weston* [1968] 2 All ER, but I ordered costs in the cause herein. I had considered that the 2 years' delay by the 3rd defendant had in fact caused the plaintiffs to incur more costs in attempting to enforce that unfortunate judgment, as in fact I had vacated the date of hearing of a notice of motion to commit the 3rd defendant for contempt in connection with the non-compliance of the irregular judgment in default of appearance. I therefore exercised my discretion by making that order for costs in the cause.

Also found at [1987] 2 CLJ 266